In the

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

SOUTHWESTERN GREYHOUND LINES, INC.,
Petitioner,

v.

A. L. BUCHANAN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was rendered on February 24, 1942. It is not yet reported, but may be found at page 698 of the printed record.

JURISDICTION

A statement of the basis of the jurisdiction of this Court is contained in the Petition, and in the interest of brevity is not repeated here.

STATEMENT OF THE CASE

The essential facts of the case are stated in the Petition, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ERROR

The errors to be urged are set forth in the appendix to the Petition and in the interest of brevity are not repeated here.

POINTS AND ARGUMENT IN SUPPORT THEREOF

POINT I.

No false statement vitiating the release was made by any representative of petitioner, as the only statement of fact made by Claim Agent Massey was not false, and Dr. Curb was not a representative of petitioner. (Germane to Specifications 1, 2 and 3).

Summary of Argument

It is undisputed that Dr. Curb stated to Massey that respondent's wife was not seriously hurt and would be all right in a short time, and that Massey repeated the statement to respondent and added his own assurances to the same effect. These are the only statements claimed to have been made.

The trial court overruled petitioner's motion for an instructed verdict and charged the jury that if it found any of the foregoing statements to be incorrect, the release could be set aside for fraud.

To constitute fraud there must be (1) a **false** representation (2) of a material **fact** (3) by a **representative** of the party charged with the fraud.

Massey correctly repeated what Dr. Curb told him, and such repetition was not a "**false** representation." Respondent does not claim that the repetition was false.

Massey's own statement that respondent's wife was not seriously hurt and would be all right, being the statement of a layman and not a skilled physician, was purely an opinion and not a statement of **fact.**

Dr. Curb was employed by respondent's wife because he was her sister's family physician. Dr. Curb was respondent's attending physician and had no connection with petitioner. His representations, therefore, whether correct or incorrect, were not the representations of petitioner.

There being no element of fraud present in the case, the trial court was in error in submitting it to the jury.

Argument

Petitioner's motion for an instructed verdict based on the theory that respondent failed to establish any ground for setting aside the release was overruled, and the jury was charged that the release could be set aside if it was procured by fraudulent representations. The representations referred to by the court were:

(A) Claim Agent Massey's statement to respondent and his wife (1) that Dr. Curb said respondent's wife was not seriously hurt and would be all right in a short time; and (2) that respondent's wife was not seriously hurt and would be all right in a short time (R. 607).

(B) Dr. Curb's statement to Massey that respondent's wife was not seriously hurt and would be all right in a short time (R. 608).

Respondent does not claim that any statements other than the foregoing were made.

(A) **Claim Agent Massey.**

The test of fraud by which Massey's statements must be measured is quite simple: Did he make (1) a **false** statement of (2) a material **fact?**[1]

The statement by claim agent Massey that Dr. Curb said respondent's wife was not seriously hurt and would be all right in a short time was not **false.** The record is entirely without dispute that Dr. Curb did say exactly what Massey quoted him as saying (R. 442-3, 471-2, 591-2, 172). Respondent has never claimed that the repetition was inaccurate. In fact, both respondent (R. 531) and petitioner (R. 442) offered in evidence Dr. Curb's written report to Massey made on January 9, 1939, reading:

> "Opinion: Outside of general soreness, there should be no disability as result of injuries. Complete recovery expected within two weeks following date accident" (R. 592).

Since there is nothing in the record to suggest that Massey's statement as to what Dr. Curb told him was not an accurate repetition, element (1) above of actionable fraud is not present, and such correctly quoted opinion of the releasor's doctor cannot be made the basis for setting aside the release. While a misrepresentation of what releasor's doctor said may be made the basis of fraud (**Pom-**

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[1] Williston's **Law of Contracts,** Volume 3, Section 1487, names the first essential of fraud: "(1) A **false** representation of a material **fact.**"

Texas Jurisprudence, Volume 20, pages 17-19, Section 8: "Actionable fraud exists when one makes a **false** representation of a material **fact.**"

Walton Farrar, Administrator, et al. v. John Churchill, Trustee, et al., 135 U. S. 609, adopted in **Whitsel, et al. v. Hoover, et al.** (Tex. Civ. App.), 120 S. W. (2d) 930 (error dismissed): "The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed, and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material **fact,** and must be **false** * * *" (Emphasis supplied).

eroy's Equity, Section 878), a truthful repetition of a statement by releasor's doctor cannot constitute fraud.[2]

As to Massey's personal views [which the trial court apparently did not consider material, as they do not appear to be included in his charge to the jury (R. 607)], they fail to meet element (2) above of the first essential of fraud. A representation must be one of **fact** and not of **opinion.**[3] Here, when Massey said that respondent's wife was not seriously hurt and would be all right in a short time, such statement was obviously an expression of Massey's judgment and opinion, and was not a statement of known **fact.**

In Section 1491, Volume 3, **Law of Contracts,** Williston says:

> "Even when statements positive in form are made, the hearer may often know perfectly well that the expression is necessarily one of opinion."

and in 3 **Corpus Juris Secundum** 192, it is said:

> "Mere statements of opinion on the part of the agent, where the person to whom such statement was made was as able as the agent to form an opinion to determine for himself, does not constitute fraud for which the principal will be liable."

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[2] **Panhandle & Santa Fe Ry. Co. v. O'Neal** (Tex. Civ. App.), 119 S. W. (2d) 1077, error refused: "Taylor's [the claim agent's] statement to O'Neal as to what Dr. Rush told him (and on which statement alone O'Neal testified he relied in executing the release) was shown by the undisputed evidence to be true. * * * The statement by Taylor as to what Dr. Rush said being the statement, according to plaintiff's testimony, that plaintiff relied on and that induced him to execute the release and that statement being true, * * * is certainly no support for cancellation of the release."

[3] For exception to this rule see cases cited in footnotes, p. 23, supra, wherein under some circumstances the opinion of a releasee's doctor, because of his specialized training, may be considered a statement of fact.

Massey was not a doctor (R. 516), and the record does not indicate that he made any examination of respondent's wife. She knew how she felt, and how much or how little pain she had, matters concerning which Massey could have had no knowledge. She had been examined by and talked with, and had full access to her own physician, and the latter was Massey's only source of information. Such information as he obtained from that source, Massey passed on to respondent and his wife. Obviously Massey knew less than either of them, and they must have known "perfectly well that his expression was necessarily one of opinion." What Massey said could have been of little or no importance even as an opinion. Certainly it was no more than that.

The opinion of the Supreme Court of Iowa in the case of **Douda v. Chicago R. I. & P. Ry. Co.**, 119 N. W. 272, is illustrative of the position of petitioner herein with reference to **both** of the statements charged to Massey. There the court said:

> "It was also error in connection with the allegations of fraud to submit the question whether defendant's agent, as an inducement to the settlement, represented that plaintiff's injuries were slight and that he would recover therefrom. The only evidence as to such representations was that defendant's claim agent at the time of procuring a settlement represented that he understood from defendant's physician that plaintiff would be well in three weeks, and further that the claim agent stated affirmatively that plaintiff would be well in three weeks. **It was not shown that the statement as to what the physician said was false,** and the direct representation that plaintiff would recover in three weeks **was evidently merely an expression of opinion**, not shown to have been fraudulently made" (Emphasis supplied).

In the **Douda** case, the claim agent quoted the defendant's physician, to whom the plaintiff presumably would not have had the same access as did respondent here to his own physician. In the **Douda** case, as here, "it was not shown that the statement as to what the physician said was false." In the **Douda** case, as here, "the direct representation that plaintiff would recover (within a short time) was evidently merely an expression of opinion." **There is simply no basis in law for the rescission of the settlement agreement involved herein because of either or both of the statements charged to Massey.**

(B) **Dr. Curb.**

It is undisputed that Dr. Curb stated, both to Massey and to respondent's wife, that she was not seriously hurt and would be all right in a short time (R. 592, 471-2). That was his opinion on January 9, 1939, and that was still his opinion at the time of the trial, November 21, 1940.[4]

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[4] The record pertaining to this point is quite vital. It reads (R. 442-3):

"Doctor [Curb], I want to read to you the last paragraph, under the heading, 'Opinion.' (Reading) 'Outside of general soreness, there should be no disability as a result of injuries. Complete recovery expected within two weeks following the date of the accident.'

"Q. Do you recall having made that report to Mr. Massey?

"A. Yes, sir.

"Q. Did you?

"A. Yes, sir.

"Q. I wish you would tell the court and jury whether or not that was your honest judgment of the condition of that woman at that time?

"A. Yes, sir, that was my honest opinion.

"Q. I will ask you to tell the court and jury whether or not you had occasion since to change that opinion?

"A. No, sir.

"Q. You still believe that?

"A. Yes, sir.

"Q. And you told Mr. Frank Massey that when he asked you

Now, respondent did not allege that Dr. Curb was guilty of any fraud in making such statement (R. 1-25). This is understandable, as respondent would naturally be hesitant to try to base fraud on the opinion of his own doctor. Nevertheless the trial court charged the jury that if it believed Dr. Curb's statements were untrue, the settlement agreement could be set aside and respondent could recover[5] (R. 608). With or without pleading to support it, such charge was not a correct statement of the law of Texas. The latest Texas decision on the point, **Lipscomb v. Houston Elec. Co.**, 149 S. W. (2d) 1042, was referred to in the petition for a writ, but for the court's convenience, the quotation, which is quite short, is repeated here:

> "It seems to be the settled law in this state that in order to avoid the effect of a release on the ground of misrepresentation or fraud on the part of physicians, the releasor must show that the physician was employed by the releasee, since otherwise, the latter would not be responsible for their representations and advice."

It is uncontroverted in the record that Dr. Curb was employed by, was in attendance upon and was the physician of respondent's wife, and had no connection with petitioner.[6]

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about these people?
"A. Yes, sir."

And R. 471-2:

"Q. In this statement you said you signed in which you said was true, you said, 'I do not think the injury is serious and so advised Mrs. Buchanan.' And then you said, 'I advised Mrs. Buchanan she would be well as ever in a few days and that in my opinion her injuries were trivial.' When was it you advised her that—that was before you made this statement for Mr. Massey?
"A. That was before I made this statement for Mr. Massey, yes, sir."

[5] The trial court's charge that this was so if the doctor was acting "for either or both parties in this transaction" is considered in detail under Point II hereof.

[6] See Summary and Short Statement, pages 2 and 3 of the Petition, for detailed facts and record references.

The courts of Texas have frequently had difficulty in drawing a clear-cut line of distinction between a statement of a releasee's physician which is purely an opinion[7] and one which may be considered "a statement of fact."[8] This problem is only encountered in determining when a release can or cannot be set aside by virtue of a mis-statement by a **releasee's** physician. No problem has ever arisen when the statement has been made by a **releasor's** physician.

The rule covering the latter situation is summarized in 23 R. C. L. 393:

> "The fact that a releasor, in making the settlement, relies on the opinion of his own physician as to the nature and probable results of his own injuries, does not afford any ground for setting aside the release, though the opinion is incorrect."

The same rule is recognized in 48 A. L. R. 1508, wherein it is said:

> "It has been held that misrepresentations regarding the nature and extent of the injury, made by physicians of the releasor, do not constitute a basis for avoidance of the release of a claim for personal injuries, since the releasee is not responsible for the representations and advice of such physicians."

Illustrative of the principal announced in the foregoing text is the cited case of **Colorado Springs & Interurban Ry. Co. v. Huntling** (Sup. Ct. of Colorado), 181 Pac. 129.

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[7] **Quebe v. Gulf, C. & S. F. R. Co.**, 98 Tex. 6, 66 L. R. A. 734, 81 S. W. 20, 1 Ann. Cas. 545; **Gulf C. & S. F. R. Co. v. Huyett**, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669; **Texas Midland R. Co. v. Wilson**, 263 S. W. 1109.

[8] **Alenkowsky v. Texas & N. O. R. Co.**, 188 S. W. 956; **Missouri, K. & T. R. Co. v. Haven**, 200 S. W. 1152; **St. Louis Southwestern R. Co. v. Thomas**, 244 S. W. 839; **El Paso Electric R. Co. v. Cowan**, 248 S. W. 442; **Jones v. Gulf, C. & S. F. R. Co.**, 73 S. W. 1082

In the latter case, the charge of the court referred to misrepresentations of a physician without making it clear whether the reference was to the physician (Dr. Allen) employed by plaintiff or to the physician (Dr. Hanford) employed by defendant. The court held:

> "If the physician referred to is Dr. Allen, then no advice given by him and no reliance placed upon his representations can form any basis for the recovery, **because he was her physician, and for his representations and advice the company is not responsible.**" (Emphasis supplied).

Similarly here, "no advice given by Dr. Curb and no reliance placed upon his representations can form any basis for a recovery, because he was respondent's physician, and for his representations and advice petitioner is not responsible."

POINT II.

The charge of the trial court permitting the release to be set aside if Dr. Curb was acting for either or both parties was erroneous and was not a submission of petitioner's requested charge that if Dr. Curb was respondent's physician and not the agent of petitioner, the release could not be set aside because of statements made by him. (Germane to Specifications 4 and 5).

Summary of Argument

Petitioner's defense to this action was based upon the release executed by respondent and his wife. Petitioner's motion for an instructed verdict having been overruled, petitioner requested the court to charge the jury that the release could not be set aside because of any statements

of Dr. Curb if the jury found that Dr. Curb was respondent's physician and not the agent of petitioner. This charge was refused and instead the court instructed the jury that if it believed Dr. Curb's statements were untrue and if it further believed that Dr. Curb was acting "for either or both parties in this transaction," the release could be set aside. Thus the jury was instructed that the release could be vitiated if Dr. Curb was acting for petitioner or for respondent or for both petitioner and respondent. This was the equivalent of instructing a verdict for respondent if Dr. Curb's statements were incorrect, without regard to petitioner's responsibility for such statements.

Argument

In its motion for an instructed verdict, petitioner, after pointing out that the representations of Massey, being an accurate repetition of the opinion of Dr. Curb, could not be made the basis of fraud, stated specifically (R. 603):

> "Moreover, the representation of Dr. Curb cannot be the basis of setting aside the release and check, on the ground of fraud, for the reason that said representations or opinions expressed by Dr. Curb were made by the plaintiff's own physician and agent and not by an agent or representative of the defendant."

Petitioner's motion for an instructed verdict having been overruled, petitioner requested in writing the following special charge (R. 612):

> "Gentlemen of the Jury:
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> "If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of

> the doctor to be true, and relied thereon; nevertheless, if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict."

In charging the jury with reference to the statements of Dr. Curb, the only instruction undertaking to deal at all with the matter of Dr. Curb's agency is contained in the following quotation from the court's charge (R. 608):

> "(If) you further believe that this doctor was acting not merely for plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, * * * then he may recover."

Under this charge the jury was instructed that if the doctor was acting for "both parties," respondent could recover, and that if the doctor was acting for "either" party, respondent could recover. In other words, the trial court charged the jury **that respondent could recover if the doctor was the agent of petitioner, and that respondent could recover if the doctor was the agent of respondent, and that respondent could recover if the doctor was the agent of both parties.** This is perhaps as grave a misstatement of law as can be conceived.

The jury was given no charge denying respondent the right to recover if it found that Dr. Curb was not the agent of petitioner. In its specially requested charge, petitioner asked the court in plain, unambiguous words to instruct the jury that if Dr. Curb was respondent's own physician and was not the agent of petitioner, the release could not be set aside because of any statements of Dr.

Curb. If there was any evidence in the first place justifying the submission of the case to the jury upon the ground of fraud by Dr. Curb, this requested charge presented petitioner's principal, if not sole defense thereto; but such defense was never submitted to the jury.

It is possible that the trial court started out upon the charge in question with the thought of instructing the jury that if Dr. Curb was acting for respondent alone, respondent could not recover. This thought, if present in the court's mind, was immediately negatived by the instruction that if Dr. Curb was acting for either party, respondent **could** recover. But even if, for the sake of analysis, the words "either or" be treated as stricken from the charge so that the charge would have read: "If you believe that this doctor was acting not merely for plaintiff alone, but for * * * both parties in this transaction * * * then plaintiff may recover," such charge would still be utterly erroneous and a judgment based thereon could not stand. A contract or agreement cannot be abrogated by one party thereto because of the alleged fraud of an agent who has acted for both parties in the transaction. This rule is followed by the courts of Texas,[9] and we know of no jurisdiction which does not adhere thereto. The principle is recognized by the Supreme Court of Missouri in the case of **Fuchs, et al. v. Leahy,** 9 S. W. (2d) 897, which

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[9] **Goodwin v. Daniel, et al.,** 93 S. W. 534 (Texas—Writ of Error denied by the Supreme Court);
Blair v. Baird, 94 S. W. 116 (Texas—Writ of Error dismissed);
Austin, et al. v. Rupe, et al., 141 S. W. 547 (Texas—No writ applied for).

quotes with approval the doctrine as stated in 2 **Mechem on Agency** (2nd Ed.), Section 2140:

> "The (common agent) owes no more duty to one than to the other; each one of the principals is under an equal duty to supervise the agent and to protect his own interest, and there is no reason why the misconduct of the agent should be imputed to one principal rather than to the other."

But the trial court (even if we strike the words "either or" from the charge) did impute the conduct or statements of Dr. Curb to petitioner rather than to respondent when he charged that if Dr. Curb was acting for both parties, petitioner would be responsible for his statements and respondent could recover from petitioner. This was error.

But we cannot strike the words "either or" from the charge. "Either party" clearly meant petitioner or respondent, since they were the only parties involved. So that, instead of being instructed as requested by petitioner that the release could not be set aside for mis-statements of Dr. Curb if he was respondent's doctor and not the agent of petitioner, the jury was charged to find fraud on the part of petitioner operating to vitiate the release if Dr. Curb's statements were incorrect, even though Dr. Curb was respondent's physician, and was in no sense the agent of petitioner.

It is obvious that in setting aside the settlement agreement and awarding additional damages, the jury decided that Dr. Curb had underestimated the extent of the injuries. This is true whether the jury had in mind the opinion given by Dr. Curb directly to respondent or the same opinion given to respondent through Massey. The jury may have felt that if respondent was misled by Dr.

Curb's opinion, he should recover whether Dr. Curb was employed by and represented respondent or petitioner. It was therefore the duty of the trial court to make clear to the jury that if it believed respondent was misled by Dr. Curb's opinion, nevertheless respondent could not recover **if Dr. Curb was the agent of respondent and not of petitioner.**

Under the law of Texas, petitioner had the right to have its defense submitted affirmatively.[10] Its requested charge embodied its defense, simply and clearly. But the charge of the court not only failed to submit such defense affirmatively, **it failed to submit it at all.**

With the charge of the trial court in front of him, no conscientious juror could have done other than return a verdict for respondent if he believed Dr. Curb had underestimated the extent of injuries, regardless of his belief concerning Dr. Curb's agency. The court might just as well have charged the jury: "if you find the injuries sustained to have been greater than estimated by Dr. Curb, you will return a verdict for respondent." This would have ignored petitioner's defense based upon the settlement agreement. That is exactly what the court's charge as given did.

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[10] **M. K. & T. Ry. Co. v. McGlamory, et al.,** 89 Tex. 635, 35 S. W. 1058;

Fox v. Dallas Hotel Co., 111 Tex. 461; 240 S. W. 517.

Dallas Ry. & Terminal Co. v. Ector, 116 S. W. (2d) 683 (Texas Commission of Appeals): "The principle governing these decisions is the same as that governing the rule that the defendant is entitled to an affirmative presentation of his defenses. With respect to this valuable right of the defendant no distinction has been made between cases submitted on general charges and those submitted on special issues" (Emphasis supplied).

POINT III.

The Circuit Court, in affirming the judgment, based its action upon a misconstruction of the charge of the trial court; and since the charge as construed by the Circuit Court was neither raised in the case nor given to the jury by the trial court, the judgment of the Circuit Court is erroneous. (Germane to Specifications 6 and 7).

Summary of Argument

The charge of the trial court was construed by the Circuit Court as instructing the jury that if respondent **believed** that Dr. Curb was acting for both parties and not merely for respondent, the release would be binding, but not otherwise. Such a charge would have **assumed** that Dr. Curb was acting for both parties, without any finding by the jury to that effect. Under such a charge, the case would have turned not on what party Dr. Curb was actually acting for but on what party respondent **thought** Dr. Curb was acting for. No such issue was raised by the pleadings or evidence of either party. The trial court did not so charge the jury at all, but instead charged that the release could be set aside if Dr. Curb was acting "for either or both parties in this transaction." The charge as construed by the Circuit Court was not given, but would have been erroneous had it been given.

Argument

The Circuit Court affirmed the judgment upon the theory that the trial judge charged the jury that if respondent "believed that the doctor (Dr. Curb) was acting not merely for plaintiff alone but for both parties, he

would be bound by the release" (R.701, Opinion of Circuit Court). The Circuit Court held that such charge correctly stated the law of Texas governing the case, and that petitioner's special requested charge "was covered by the general charge."

Petitioner submits, respectfully but deliberately, first, that the trial judge did not so charge the jury; second, that such charge, had it been given, would not have correctly stated the law governing the case; and third, that such charge, had it been given, would not have covered petitioner's special requested charge.

Of course if such a charge as described by the Circuit Court was not given by the trial judge, the second and third suggested propositions become purely academic, except as they further demonstrate that the opinion of the Circuit Court did not really deal with this case at all.

That part of the charge of the trial court involved here and the Circuit Court's construction thereof are for convenience and clarity set down opposite each other immediately hereunder:

The trial court:

"If the minds of the parties met and he understood at the time he signed it that his doctor had represented that his wife should be up and not in bed, and you further believe that the doctor was acting not merely for the plaintiff alone, but for either or both parties in this transaction, * * * **then he may recover.**"

The Circuit Court:

"In substance, the Judge charged the jury that if the minds of the parties met at the time Buchanan signed the release and he believed that the doctor was acting not merely for plaintiff alone but for both parties, **he would be bound by the release.**"

The trial court thus charged the jury that respondent **could** recover if the "doctor was acting not merely for the plaintiff alone, but for either or both parties." The Circuit Court states that the jury was charged that respondent **could not** recover if respondent believed that the "doctor was acting not merely for plaintiff alone, but for both parties." To whatever extent the charge given and the Circuit Court's construction thereof bear any relation to each other, they come close to being exactly opposite. Actually, however, they bear little relation to each other.

There is a general rule of law, applicable to some situations (but not to this one), that if an agent has represented both parties to an agreement, and if the party who seeks to avoid the agreement **knew** that the agent represented both parties, then such party cannot have the agreement set aside on the ground that his agent also represented the other party. The corollary of the rule is that if the agent represented both parties without the knowledge of one of the parties, such party may avoid the agreement. This is the rule that the Circuit Court obviously had in mind.

However interesting such rule may be as a matter of abstract law, it has no application to this case. There is no allegation or suggestion in respondent's petition (R. 1-25) that Dr. Curb was the agent of both respondent and petitioner, and that respondent did not know that Dr. Curb was the agent of both; and there is no allegation or suggestion in petitioner's answer (R. 26-32) that Dr. Curb was the agent of both parties and that respondent **did** have knowledge of a joint agency.

No evidence was offered by either side tending to disclose respondent's knowledge or belief concerning Dr. Curb's agency. Respondent was not asked whether he believed that Dr. Curb was acting for respondent alone, or whether he believed that Dr. Curb was acting for both parties; and no circumstance in the record is recalled that would have aided the jury in returning a verdict based upon such a charge had it been given.

Petitioner was given no opportunity to offer a defense to the theory that the release would not be binding if respondent believed that Dr. Curb was acting for respondent alone, because such theory was never advanced by respondent either by means of pleading or proof. The theory was not raised or mentioned in the brief of either Appellant or Appellee filed in the Circuit Court.

If such theory had been raised by pleadings, and if it had been supported by any evidence, and if it had been contained in the trial court's charge, still it would not have submitted or covered petitioner's requested charge nor would it have correctly stated the law governing this case. Had such charge been given, the jury would thereby have been told that the release was binding if respondent believed that Dr. Curb was acting for both parties, but was not binding if respondent believed that Dr. Curb was acting for respondent alone. Such theoretical charge does not ask the jury to determine what party Dr. Curb was acting for (as requested by petitioner), but only what party or parties respondent **believed** Dr. Curb was acting for. It thus assumes, wholly without warrant, that the evidence established as a matter of law that Dr. Curb was **not** acting for respondent alone—for obviously if he was acting

for respondent alone, respondent's correct belief that he was so acting would not be ground for setting aside the release. And yet, under the Circuit Court's construction of the charge, the jury would have been required to set the release aside if it found that respondent **believed** that Dr. Curb was acting for him alone, even though such belief was correct. Petitioner submits that if Dr. Curb was acting for respondent alone (which he was), respondent's belief relative thereto was wholly immaterial.

But whether the Circuit Court's hypothetical proposition of law be sound or unsound in theory, it is still purely hypothetical. It was never involved in the case at any time, and was certainly not the charge given by the trial court. The latter instructed the jury that if Dr. Curb was acting for either or both parties, respondent could recover. That is not the law. And the Circuit Court's unbelievably erroneous construction thereof cannot make it the law.

CONCLUSION

The health of respondent's wife at the time of this trial was unhappily quite bad. The physicians who were called to testify by petitioner admitted that she was suffering from a pronounced kidney trouble (R. 418, 447), diagnosed as Bright's disease (R. 411) and a probable early pulmonary tuberculosis (R. 388). There was a conflict in the medical testimony as to whether her condition could have had any connection with an automobile accident, though all agreed that such condition was not good.

But, whether respondent's wife was ill or injured, petitioner was not guilty of fraud in connection with the settlement made herein. The court charged the jury that it

could find petitioner guilty of fraud if Massey's statement as to what Dr. Curb told him was untrue; but there was no evidence that it was untrue, and even respondent did not claim that it was untrue. The court charged the jury that it could find petitioner guilty of fraud if Dr. Curb's statement concerning the injuries was untrue; but there was no evidence that Dr. Curb spoke for petitioner, and even respondent did not claim that Dr. Curb spoke for petitioner.

It is not right that petitioner should thus be condemned for something which it did not do and something which **no one contends that it did.** Petitioner asks only for that equal treatment at the hands of our courts that is guaranteed to everyone. And so petitioner respectfully prays that this Court issue its writ of certiorari so that the judgment below may be corrected.

Respectfully submitted,

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